

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

BILLIET FAMILY ASSETS,
Plaintiff,

vs.

Case No. 17-1452-CB

SHALLOWBROOK PROPERTIES, LLC,
KENNETH DIETRICH, and JEFFREY FLEURY
Defendants.

OPINION AND ORDER

Plaintiff Billiet Family Assets, LLC ("BFA") moved for partial summary disposition under MCR 2.116(C)(10) on claims for common-law conversion, statutory conversion, and civil conspiracy in counts IV, V and VII of its Amended Complaint. Shallowbrook Properties, LLC ("Shallowbrook"). Kenneth Dietrich ("Mr. Dietrich") and Jeffrey Fleury ("Fleury") seek summary disposition under MCR 2.116(l)(2).¹

I. Background

BFA owns a 25% interest in Shallowbrook. BFA alleges that Shallowbrook received payment for an asset, real property, pursuant to a land contract sale. However, BFA claims that the land contract closing occurred without its knowledge or participation depriving it of its share of proceeds. Mr. Dietrich is a Certified Public Accountant, and a shareholder with the majority interest in Shallowbrook. Defendant Mr. Fleury is an attorney and son of Shallowbrook shareholder Frank Fleury. Mr. Fleury acted as attorney for Shallowbrook at the land contract closing. Proceeds from the land

¹ On May 7, 2019, Plaintiff dismissed its claims against Mr. Fleury by stipulation. Consequently, all issues raised in Plaintiff's motion for summary disposition against Mr. Fleury are moot and will not be addressed in this Opinion and Order.

contract closing were initially deposited to the Client Trust Account of the Fleury Law Firm, PLLC.

BFA alleges that it repeatedly requested that Shallowbrook and Mr. Dietrich provide information regarding an accounting and the status of the payoff from the land contract sale, but to no avail. BFA states that Mr. Dietrich falsely represented that the land contract had not closed, while at the same time receiving the final payoff in October 2015, filing a false tax return and then lending BFA's share to another entity in which Mr. Dietrich had an interest.

On May 22, 2018, BFA filed an Amended Complaint alleging: count I, injunctive relief; count II, accounting as to Shallowbrook and Dietrich; count III, fraudulent misrepresentation to Shallowbrook and Dietrich; count IV, common law conversion; count V, statutory conversion, count VI, breach of fiduciary duty, Fleury and count VII, civil conspiracy.

BFA filed its motion for summary disposition on November 30, 2018. The Shallowbrook Defendants filed a Response on January 7, 2019. BFA filed Replies on January 24, 2019. The Court took the matter under advisement on February 4, 2019.

II. Standard of Review

The Court will grant a motion for summary disposition under MCR 2.116(C)(10) if the documentary evidence shows no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. *Fulton v Pontiac Gen Hosp*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials in the pleadings but

must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court does not assess credibility, weigh the evidence, or resolve factual disputes; if material evidence conflicts, the Court will deny the motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

If the trial court is satisfied that “the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.” MCR 2.116(I)(2). In other words, the trial court may grant summary disposition to the nonmoving party if it is entitled to judgment as a matter of law. *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

III. Law and Analysis

A. Common-law Conversion (Count IV) and Statutory Conversion (Count V)

Conversion is any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein. *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). To prove conversion of money, a defendant must have obtained money without the owner’s consent to the creation of a debtor-creditor relationship and must have an obligation to return the specific money entrusted. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004), quoting *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111–112; 593 NW2d 595 (1999). “Although an action cannot be maintained for conversion of money unless there is an obligation on the part of the defendant to return the specific money entrusted to his care, it is not necessary that the money should be specifically earmarked for its return.” *Citizens Ins Co of Am v Delcamp Truck Ctr, Inc*,

178 Mich App 570, 575; 444 NW2d 210 (1989) citation omitted (An action for conversion lies where an individual retains the full amount of a check when only entitled to a portion).

To state a claim for conversion, a plaintiff must allege that the “initial exercise of domain over the property” was wrongful. *Curry*, 261 Mich App at 592. Conversion “can be committed unwittingly if the defendant is unaware of the plaintiff’s outstanding property interest.” *Magley v M & W Inc*, 325 Mich App 307; ___NW2d___ (2018) citations omitted. “Good faith, mistake, and ignorance are not defenses to a claim of conversion.” *Id.* citations omitted.

A plaintiff seeking treble damages under MCL 600.2919a(1)(a) for statutory conversion must present evidence that the conversion was to defendant’s *own use*. *Aroma Wines & Equip, Inc v Columbian Distribution Services, Inc*, 497 Mich 337, 356; 871 NW2d 136 (2015). Someone alleging conversion to the defendant’s “own use” under MCL 600.2919a(1)(a) “must show that the defendant employed the converted property for some purpose personal to the defendant’s interests, even if that purpose is not the object’s ordinarily intended purpose.” *Id.* at 359. MCL 2919a states,

- (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
 - (a) Another person's stealing or embezzling property or converting property to the other person's own use.
 - (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person . . . knew that the property was stolen, embezzled, or converted.

1. Conversion as to Shallowbrook

BFA names Shallowbrook as a defendant to its conversion claims. However, BFA has not set forth its claim for conversion as it specifically relates to Shallowbrook. BFA has not established that Shallowbrook obtained the money without BFA's consent to the creation of a debtor and creditor relationship. The Court is unable to determine from the present record if BFA consented to the closing of the land contract. Since BFA presents evidence that it repeatedly requested information from Shallowbrook and its principals regarding the status of the closing of the transaction, a finder of fact could conclude that BFA consented to the creation of a debtor creditor relationship in that Shallowbrook would first obtain the funds from the closing and then distribute them according to membership interest.

BFA also fails to address whether Mr. Dietrich acted on behalf of the entity when appropriating the funds or how BFA has a direct versus a derivative claim. For these reasons, BFA is not entitled to summary disposition on its claim for conversion against Shallowbrook.

2. Conversion as to Mr. Dietrich:

For its conversion claim against Mr. Dietrich, BFA cites to deposition testimony wherein Mr. Dietrich admitted misrepresenting the status of the closing. BFA also shows that Mr. Dietrich filed an inaccurate K-2 with the IRS showing that Shallowbrook made a distribution to BFA when it had not. Exhibit 9. Mr. Dietrich testified that he could not give a good reason for not paying BFA but that it took longer for him to "get the money together" because he "had to take the money out of [his] wife's retirement fund." BFA's Exhibit D at 42. BFA concludes that since Mr. Dietrich was the managing

member and controlled the distributions, it has therefore satisfied the elements of a conversion claim. BFA argues that Mr. Dietrich “did not have the right” to distribute the funds in the manner he did or to divert funds to Standard Drywall.

Yet on a claim for conversion of money, as opposed to a claim for breach, BFA has the added burden of showing that the defendant had an obligation to return the specific money entrusted and obtained the money without the owner’s consent to the creation of a debtor and creditor relationship. *Citizens Ins Co of Am v Delcamp Truck Ctr, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989). BFA has not presented sufficient evidence to establish that Mr. Dietrich had an obligation regarding specific money as opposed to a general obligation to pay a certain amount. Specifically, the Court has an insufficient record to determine as a matter of law whether Mr. Dietrich had an obligation to keep the funds intact or even if he is the party responsible for lending the funds to Standard Drywall. As a result, BFA is not entitled to summary disposition on conversion regarding Mr. Dietrich.

B. Civil Conspiracy (Count VII)

“A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” *Advocacy Org for Patients & Providers v Auto Club Ins Ass’n*, 257 Mich App 365, 384; 670 NW2d 569, 580 (2003) citation omitted. “The agreement, or preconceived plan, to do the unlawful act is the thing which must be proved.” *Temborius v Slatkin*, 157 Mich App 587, 600; 403 NW2d 821 (1986). “Direct proof of agreement is not required, however, nor is it necessary that a formal agreement be proven.” *Id.* “It is sufficient if the circumstances, acts and conduct of the parties

establish an agreement in fact. Furthermore, conspiracy may be established by circumstantial evidence and may be based on inference.” *Id.* citation omitted.

Using antitrust principles, courts have concluded that an agent and principal do not count separately for purposes of finding a proscribed combination, so long as the agent or employee acts within the scope of agency. *Metro Club, Inc v Schostak Bros & Co, Inc*, 89 Mich App 417, 420; 280 NW2d 553 (1979); *Blair v Checker Cab Co*, 219 Mich App 667, 674; 558 NW2d 439 (1996); *Tropf v Holzman & Holzman*, unpublished per curium opinion of the Court of Appeals, issued January 17, 2006(Docket No. 257019) (Applying agent/principal rule to civil conspiracy).

According to BFA, “Liability against Shallowbrook and Dietrich is self-evident where Dietrich used the entity as a means to convert Billiet’s lawful distribution.” However, “self-evident” is not an argument, and BFA has failed to establish that it is entitled to summary disposition on its civil conspiracy claim claims.

IV. Conclusion

For the reasons set forth above, BFA’s motion for partial summary disposition is DENIED. Defendants motion under MCR 2.116(I)(2) is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: MAY 21 2019

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge

